

JUL 05 2006

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BONNIE SAMUELS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC.,
erroneously sued as UBS PAINWEBBER,
INC. and PAINWEBBER
INCORPORATED,

Defendant - Appellee.

No. 04-56160

D.C. No. CV-03-07538-JFW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted April 5, 2006
Pasadena, California

Before: BRIGHT**, PREGERSON, and ALARCON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Bonnie Samuels appeals the district court's summary judgment in favor of UBS Financial Services ("UBS"). Samuels argues (1) the district court erred in granting summary judgment on her discriminatory retaliation claim because triable issues of fact exist, and (2) the district court erred in granting summary judgment on her claim for wrongful termination in violation of public policy under the Fair Employment and Housing Act ("FEHA"). We reverse and remand for further proceedings.

We do not recite the facts in detail as they are familiar to the parties. On December 11, 2002, Samuels complained to her supervisors, including Human Resources Manager Luis Quinto, that she was being discriminated against based on her age and gender with respect to her salary. UBS gave Samuels an immediate salary increase of \$12,000 and a \$25,000 year-end bonus. UBS claims in this lawsuit that it did so because Samuels was a valuable employee and not because her assertions were valid.

On March 20, 2003, a number of UBS employees made a prank phone call intended for the celebrity husband of a UBS client. The call was unsuccessful in reaching the celebrity. Samuels's supervisor, Richard LaVoice, investigated the incident, as did Luis Quinto. Although Samuels denied any participation, two witnesses confirmed that she was present during the incident and one said that Samuels instigated the phone call.

According to Samuels, on the morning of March 24, she sent Quinto a letter detailing some of her prior allegations of age and gender discrimination, and she handed supervisor LaVoice a copy of the letter at that time. Later that day, LaVoice summoned Samuels to his office and terminated her employment, ostensibly because Samuels had lied and had encouraged her subordinates to lie during the investigation of the prank call. The other employees who participated in the call were reprimanded but not fired.

Samuels filed suit against UBS, alleging gender discrimination, age discrimination, retaliation, and wrongful termination in violation of public policy under FEHA. The district court granted UBS's motion for summary judgment as to each of these claims. Samuels appeals the district court's rulings on her discriminatory retaliation claim and her claim for wrongful termination in violation of public policy.

This court reviews de novo the district court's grant of summary judgment. Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1033 (9th Cir. 2005). On summary judgment, the court must view the facts and draw all inferences in the light most favorable to the nonmoving party. Id. With respect to a claim of discriminatory retaliation, "very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise

a question that can only be resolved by a fact-finder." McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124 (9th Cir. 2004) (internal quotations and citations omitted).

To establish a prima facie case of retaliation, Samuels must show (1) that she was engaged in a protected activity, (2) that an adverse employment action was thereafter taken against her, and (3) that a causal link existed between the two events. Id. Once Samuels proves a prima facie case, the burden then shifts to UBS to articulate a legitimate, nondiscriminatory reason for the employment action. Id. If UBS does so, then Samuels must raise a genuine issue of material fact as to whether the legitimate reason offered by UBS for its actions was not its true reason, but merely pretext for unlawful discrimination and retaliation. Id.; Dominguez-Curry, 424 F.3d at 1037.

The district court granted UBS's motion for summary judgment because it determined Samuels failed to satisfy the third element of this test, that is, she did not establish that a causal link existed between her complaints and her termination. In addition, the court determined that even if Samuels could establish a prima facie case of retaliation, she did not establish that UBS's articulated non-discriminatory reason for her discharge was pretextual.

According to the district court, Samuels cannot establish a causal link because "LaVoice testified at his deposition that he made the decision to terminate Plaintiff

prior to calling her into his office on March 24, 2004, and did not receive a copy of her letter to Mr. Quinto until Plaintiff handed it to him [at their meeting]." Samuels, however, maintains that she handed LaVoice the letter in the morning and was not fired until that afternoon. In choosing to believe LaVoice's side of the story over Samuels's, the district court improperly weighed the credibility of the witnesses. As this court stated in McGinest, "it is axiomatic that disputes about material facts and credibility determinations must be resolved at trial, not on summary judgment." 360 F.3d at 1115 n.5.

The district court improperly concluded that Samuels could not establish a causal link between her complaints of discrimination and her termination. Although Samuels has no direct evidence of a causal link, she may establish one "by an inference derived from circumstantial evidence, such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988) (internal quotations omitted) (citing Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)).

The evidence, when viewed in a light most favorable to Samuels, shows that Samuels established the existence of a genuine factual dispute regarding the causal link between her complaints of age and gender discrimination and her termination.

First, those who made the decision to fire Samuels knew of her prior complaints. Samuels had complained to Human Resources Manager Luis Quinto, who participated in the investigation into Samuels's misconduct. In addition, according to Samuels, Richard LaVoice learned of the discrimination complaints only a few hours before he terminated her employment.

The temporal proximity between Samuels's complaints and her termination could also lead to the inference that a causal link existed between the two events. Samuels maintains that she gave LaVoice a letter detailing her prior complaints in the morning of March 24 and was fired that afternoon. Regardless of whether the three-month period between Samuels's initial complaint and her termination would be sufficient to establish the inference of a causal link, a span of several hours certainly suffices. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001).

Moreover, a jury could disbelieve UBS's claims that it raised Samuels's salary and gave her a bonus totaling \$37,000 in December of 2002 because of her value as an employee. Rather, it could believe that UBS paid her because the employer knew it had previously unlawfully discriminated against Samuels because of her age and gender and that it intended to fire her as soon as it could find some plausible reason. Human Resources Manager Quinto, as we have observed, participated in both the

December 2002 salary raise and the March 2003 discharge. All the above inferences are grist for a jury's mill.

The district court also erred in determining that Samuels could not prove UBS's stated reason for firing her was merely pretext for discriminatory retaliation. As is the case with establishing a causal link, a jury can infer that a firing is retaliatory from the timing of the decision and the identity of those making the decision. Miller v. Fairchild Indus., Inc., 885 F.2d 498, 505-06 (9th Cir. 1989). As discussed above, Samuels presented evidence of a close temporal proximity between her supervisor's knowledge of her discrimination complaints and her termination. She also showed that those who made the decision to fire her were aware of her complaints.

In addition to the above two factors, the quality of an employee's job performance before termination can lead to the inference that an employer's explanation is merely a pretext for impermissible retaliation. Yartzoff, 809 F.2d at 1376. Samuels possessed an exemplary employment history. She worked for UBS for eleven years. During that time, the management never disciplined her. To the contrary, she received numerous promotions and salary increases. According to UBS, Samuels was so valuable an employee that the company chose to give her a substantial raise and a year-end bonus. However, UBS fired Samuels for her alleged participation in the prank call while merely reprimanding the other employees. A jury could find

from these facts that UBS actually fired Samuels in retaliation for having made age and gender discrimination claims. Viewing the evidence in a light most favorable to Samuels, as we must, we determine Samuels established a genuine issue of material fact with respect to pretext. See McGinest, 360 F.3d at 1115 n.5.

On a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. UBS maintains that no "justifiable" inference may be drawn from this evidence. However, Samuels provided detailed testimony regarding Quinto's and LaVoice's knowledge of her complaints, the temporal proximity between her complaints and her termination, and her exemplary job performance prior to termination. Her testimony did not consist of "mere conclusory allegations, which would be insufficient to defeat a motion for summary judgment." Id. (internal quotations and citations omitted). Samuels has provided enough evidence of a causal link and pretext to survive summary judgment.

Samuels's second point on appeal is that the district court erred in granting summary judgment on her claim for wrongful termination in violation of public policy. The district court granted summary judgment on this issue because it determined that the claim depended on Samuels prevailing on at least one of her other claims for relief, and the district court had already granted UBS summary judgment

on the other claims. See Esberg v. Union Oil Co., 47 P.3d 1069 (Cal. 2002). Because we hold that the district court erred in granting summary judgment on Samuels's retaliation claim, we reverse and remand the wrongful termination claim as well.

For the foregoing reasons, this case is REVERSED and REMANDED.